STRAITS SETTLEMENTS REPORTS.

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[PRIVY COUNCIL]

LORD BLANESBURGH, LORD THANKERTON and LORD RUSSELL OF KILLOWEN.

July 23, 1934.

KHOO TEK KEONG.....Appellant.

vs.

CH'NG JOO TUAN NEOH,

since deceased, & ANOR.....Respondents.

[PRIVY COUNCIL APPEAL No. 66 of 1933]

Trustee—investment clause in Will—breaches of trust—relief from liability—Trustees Ordinance, 1929, S.60.

Trustees were empowered by a Will "to invest all moneys liable to be invested in such investments as they in their" absolute discretion "think fit." They lent out trust funds (a) on personal loans on security of jewellery such loans carrying interest (b) on personal loans to chetties on no security beyond the liability of the borrowers to repay.

Held, on appeal to the Privy Council, that as to the loans on the security of jewellery and carrying interest, these investments were authorised by the Will

Also Held that the loans to the Chetties being loans on no security beyond the liability of the borrowers to repay were dispositions by the trustee of the trust estate wholly unwarranted by the terms of the trust and in breach of trust.

Semble, When a trial Judge exercises his discretion in favour of trustees under S.60 of the Trustees Ordinance, 1929, such an exercise of discretion is properly a matter of appeal, though an Appeal Court will generally be slow to interfere with it.

Held further that although the Appellant had acted honestly he had not acted reasonably in that he never really considered the question whether these dispositions of the trust fund were such in their nature as it was prudent and right for him as a trustee to make and that he ought not to be excused for his breaches of trust.

The decision of the Court of Appeal (Murison, C.J., Prichard and Terrell, JJ.) reported in 1 Mal.L.J., 141 varied.

AN APPEAL to the Privy Council from the decision of the Court of Appeal of the Straits Settlements, which is reported in 1 Mal.L.J.134.

E. W. Lavington for Appellant

J. M. Whitaker, K.C. *(The Right Honourable, Sir H. Wynne* with him) for the Respondents.

Cur. Ad. Vult.

The judgment of their Lordships (Lord Blanesburgh, Lord Thankerton and Lord Russell of Killowen) was delivered by Lord Russell of Killowen—

LORD RUSSELL OF KILLOWEN.—The action in which this appeal arises is an action for the administration of the estate of one Khoo Eu Yong, a merchant of Penang, who will be referred to as the testator.

The testator by his will, dated the 16th October, 1918, appointed Khoo Heng Poon and Khoo Tek Keong executors thereof. After bequeathing sundry pecuniary legacies and directing the investment of a sum of $10,000 to be applied as therein mentioned, he devised and bequeathed the residue of his estate upon certain trusts (including a trust for the accumulation of surplus income) during a period of twelve years from his death.

The trusts of the residue at the expiration of the period were declared in the following terms:—

"(*e*) Upon trust as to both the capital and the accumulations for my said wife and my sons Khoo Tek Chye, Khoo Tek Keong and Khoo Lip Sim in equal shares.

"(*f*) Provided always that in case my said wife shall die before the expiration of the said period of 12 years her share shall go to increase the shares or share of my sons or son who shall survive the said period or leave a child or children living at the expiration of the said period and if more than one in equal shares.

"(*g*) Provided further that if any of my said sons shall die before the expiration of the said period of 12 years without leaving a child living at the expiration of the said period his share shall go to increase the shares or share of my other sons or son who shall survive the said period or leave a child or children at the expiration of the said period and if more than one in equal shares.

"(*h*) Provided also that if any of my said sons shall die before the expiration of the said period of 12 years leaving a child or children living at the expiration of the said period and such child or children shall stand in the place of such deceased son and take *per stirpes* and equally between them if more than one the share of my residuary trust fund which such deceased son would have taken if he had been living at the end of the said period including any accrued share or shares under the last two preceding clauses."

The investment clause contained in the will ran thus:—

"11. I empower my Trustees to invest all moneys liable to be invested in such investments as they in their absolute discretion think fit with liberty to vary the same from time to time."

The Testator died on the 2nd January, 1919, and his will (with a codicil irrelevant for the present purpose) were proved by the two executors on the 16th April, 1919. Khoo Heng Poon died on the 11th January, 1927, leaving the testator's son, Khoo Tek Keong, as sole surviving trustee of the will. Khoo Tek Keong had in fact been also managing trustee. On the 19th May, 1929, Khoo Sian Tan and Cheah Inn Keong were appointed additional trustees; and on the 2nd March, 1931, they were appointed managing trustees, as from which date Khoo Tek Keong ceased to be a managing trustee, although he continued to be a trustee.

The period of twelve years expired on the 2nd January, 1931, and thereupon in the events which happened the residuary estate belonged to the testator's widow and his three named sons in equal shares.

On the 14th April, 1931, the writ in the present action was issued (the plaintiffs being the testator's widow and his son, Khoo Tek Chye) against the three trustees, in the Supreme Court of the Straits Settlements (Settlement of Penang). It asked for administration of the estate of the testator with all necessary and proper accounts and enquiries. The statement of claim in paragraph 9 thereof alleged various breaches of trust, of which it is only necessary to mention those alleged against Khoo Tek Keong, the first defendant, viz:—

> Para. 9 (4)—"The first defendant has committed breaches of trust or wilful default in lending out trust funds on personal loans on security of jewelleries without valuation."
>
> Para. 9 (6)—"The first defendant has committed breaches of trust or wilful default in lending out trust funds to Chetties without securities."

During the hearing of the action the plaintiff Khoo Tek Chye died, and his eldest son, Khoo Ee Lay, was substituted as plaintiff.

At the trial it was not in dispute that Khoo Tek Keong (hereinafter referred to as the appellant) had in fact done the acts alleged. The contest was (a) whether the acts were breaches of trust, and (b) if any of them were breaches of trust, whether he should not be relieved from liability under section 60 of Ordinance No. 14 of 1929. A further defence was raised to the effect that the plaintiffs were bound by accounts previously delivered, but this point was quite properly not pressed before their Lordships, and no further reference need be made to it.

The trial Judge (Whitley, J.) held the appellant to be "a perfectly honest trustee." He also held in regard to the acts alleged in paragraph 9 (4) and (6) of the statement of claim that no breach of trust had been committed, the transactions being covered by the investment clause in the will, and being, moreover, transactions similar to transactions in which the testator was accustomed, in his lifetime, to embark his own moneys.

The learned Judge then proceeded in his judgment to state that if these transactions had been breaches of trust he would have held that the appellant was entitled to be relieved from liability.

An order (dated the 19th May, 1932,) was accordingly made (1) declaring that the appellant had committed certain other breaches of trust (irrelevant to this appeal), and that save as therein declared the charges of breaches of trust as set out in the statement of claim had not been proved, (2) removing by consent the appellant from the trusteeship, and (3) ordering certain accounts and enquires. As to costs, the costs of all parties were ordered to be paid out of the estate, but without prejudice to all or any of such costs being directed to be paid out of the share of any beneficiary if the trial Judge should so direct on the further consideration of the action.

On appeal by Khoo Ee Lay the Court of Appeal held that the transactions alleged in paragraph 9 (4) and (6) of the statement of claim were breaches of trust, and that the appellant was not entitled to relief under section 60 of the Ordinance, and they made an order (dated the 31st August, 1932), the relevant portion of which is in the following terms:—

> "The Court doth order and declare that the Respondent committed breaches of trust in making the loans referred to in paragraphs 9 (4) and (6) of the Statement of Claim and is liable to make good to the estate of Khoo Eu Yong deceased all loss which has already accrued or may hereafter accrue by reason thereof together with interest thereon at the rate of 4 per cent per annum. And let the judgment appealed against herein be varied accordingly. And the Court doth order that the order as to costs in the Court below do stand, but that the appellant's costs of this appeal be taxed as between Solicitor and Client and when taxed be paid out of the Estate of the said deceased. And the Court doth certify for two Counsel for the Appellant. And the Court doth make no order as to the costs of the Respondent."

Murison, C.J. held that the loans on the security of jewellery were breaches of trust on the ground that they were not income-producing loans, and were therefore not strictly investments. He says of the appellant:—"He lent money on the security of jewellery. In a way this was a speculation, though a mild one. It gave no

income. The only chance of a return was a rise in price, and the opposite happened." This appears to be a misconception of fact on the part of the learned Chief Justice; the loans in fact carried interest. He further held that the loans to Chetties upon personal security might, since they produced income, be considered to be investments; but that not being expressly authorised by the investment clause, they were made in breach of trust. He thought that the appellant, although he had acted honestly, had not acted reasonably, and refused to relieve him from liability under section 60 of the Ordinance.

Prichard, J.. does not in terms state in his judgment that these two classes of loans were breaches of trust, but it must be assumed that he so held, for his judgment is in substance a refusal to grant relief from liability on the ground that the appellant's conduct in making the loans was neither reasonable nor excusable.

Terrell, J., held both classes of loans to be breaches of trust: as to the loans to Chetties, on the ground that the investment clause did not expressly authorise loans on personal security; as to the loans on jewellery, because they were made on a valuation made by the appellant himself. The learned Judge seems to have been influenced also to some extent by certain considerations which, in view of the trial Judge's finding of honesty, might, their Lordships think, have properly been left out of view. He also declined to grant relief to the appellant.

By an order dated the 23rd January, 1933, Oon Kim Lan, the administratrix of the estate of Khoo Tek Chye, and the second respondent to this appeal, was substituted as plaintiff in the place of Khoo Ee Lay.

The testator's widow appears to have died during the pendency of this appeal.

After full argument their Lordships find themselves to some extent in agreement, and to some extent in disagreement with the conclusions of the Appellate Court.

Their Lordships find it impossible, in face of the extraordinarily wide scope of the investment clause, to hold that the loans on the security of jewellery have been proved to be breaches of trust by the appellant. They were loans made upon the security of property and carrying interest; they were accordingly "investments" within the meaning of clause 11 of the will. The absence of an independent valuation at the time of the loan would not *per se* make such an investment a breach of trust. It would be a breach of trust only if at the time of the loan the security was an insufficient security and therefore an improper security for the trustee to select out of the investments authorised for the investment of the trust estate in his care. In the present case, not only is insufficiency of value at the time of the loans not proved; it is not even alleged. The only breach of trust alleged is the lending on the security of jewelleries without valuation. Their Lordships are therefore of opinion that no breach of trust in this regard has been established against the appellant.

As regards the loans to Chetties, these stand upon a different footing. Their Lordships agree with the Appellate Court that these do constitute breaches of trust by the appellant, but upon the ground that being loans on no security beyond the liability of the borrower to repay, they are not "investments" within the meaning of clause 11 of the will; they are accordingly dispositions by the appellant of the trust estate wholly unwarranted by the terms of the trust.

As to these breaches of trust, their Lordships agree with the view that the appellant has failed to establish any claim to be relieved from personal liability.

Section 60 of the Ordinance No. 14 of 1929 is in the following terms:—

> "If it appears to the Court that a trustee .....is or may be personally liable for any breach of trust.....but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same."

The finding of the trial Judge vouches for the appellant's honesty, but he must further establish that he acted reasonably and ought fairly to be excused for the breach of trust. His main contention is that he merely pursued the same course of conduct as the testator had pursued in his lifetime. Their Lordships, so far from finding in this fact grounds for saying that he acted reasonably and ought fairly to be excused for his breaches of trust and relieved from personal liability, view it from the opposite standpoint. It indicates to their minds, and the evidence given by the appellant confirms it beyond doubt, that he never considered the question of these dealings with the trust funds in the light of his duty as a trustee, or paused to consider whether it was prudent for him as a trustee to lend on the personal security of the borrowers. "I just followed what my father did," is his sole explanation of his conduct in this respect. In their Lordships' opinion, the appellant ought not to obtain any relief from personal liability for the loss occasioned to the estate by the loans on personal security. To apply the language used by Sir Robert Romer in the case of *Chapman* v. *Browne* (1902) 1 Ch., at p. 805, the appellant never really considered the question whether these dispositions of the trust funds were such as in

their nature it was prudent and right for him as a trustee to make.

One further matter remains to be mentioned. It was contended in the Appellate Court and before their Lordships' Board, that no appeal lies from the exercise by a trial Judge of the discretion conferred by section 60 of the above-mentioned Ordinance. The Appellate Court rejected this contention. Actually, no discretion had in fact been exercised by the trial Judge in the present case. There was no *decision* to exercise a discretion; there was merely an *obiter dictum* as to the course which he would have pursued if an event had happened which had not happened. The point did not, and does not, in strictness arise. Their Lordships therefore merely state that without further argument they are not prepared to differ from the views of the Appellate Court in the present case, or from the statement of Cozens-Hardy, M.R., in *Re Allsop Whittaker* v. *Bamford*, (1914) 1 Ch., at p. 14, where he said, " It is properly matter of appeal."

In the result, the appeal ought in their Lordships' opinion to succeed as to the loans on the security of jewellery, and to fail as to the loans to Chetties. The Order of the Court of Appeal should be varied by restricting the loans therein mentioned to the loans referred to in paragraph 9 (6) of the statement of claim. Their Lordships will humbly advise His Majesty accordingly.

In regard to costs, since the appellant should have been in a substantial degree successful on the appeal from the judgment of the trial Judge, their Lordships think that he might properly be placed on the same footing as to his costs of that appeal with the appellant on that appeal, who should have been only partially successful therein. Accordingly the order of the Court of Appeal must further be varied by inserting therein after the words " the appellant's costs " the words " and the respondent's costs," and striking out the words therein contained relating to the respondent's costs. There will be no order as to the costs of the appeal to His Majesty in Council.

Appeal allowed in part.

Solicitors for Appellant—*Lattey & Dawe*, London.

Solicitors for Respondents—*Herbert Z. Deane & Co.*, London.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.

August 30, 1934.

WEE ENG WAN.....Plaintiff.

v.

J. LAYCOCK & ORS..... Defendants.

[IN FORMA PAUPERIS No. 5 of 1934]

[SINGAPORE SUIT No. 982 of 1933]

Practice—suit by a pauper—dismissal of action—jurisdiction to award costs against a pauper—Civil Procedure Code, S.774.

There is no provision in the Civil Procedure Code, 1907, which confers upon the Court jurisdiction to award costs against a pauper whose suit is dismissed. An order can, however, be made against a pauper for payment of costs incurred before he gave notice of the order admitting him to sue *in forma pauperis*.

Further cosideration of action before Terrell, J. on the 28th August 1934. Question reserved for determination by the Court whether, upon the dismissal of an action brought by a pauper, an order for costs can be made against him.

The arguments sufficiently appear from the Judgment below.

Dr. C. H. Withers Payne for Plaintiff.

Roland Braddell (*Briggs* with him) for Defendants.

Cur. Ad. Vult.

TERRELL, J.—The action having been dismissed the question of costs was reserved for argument before me on August, 28th. The plaintiff sued *in forma pauperis*. The order enabling him so to sue was made on the 24th March, 1934, and notice thereof was given to the defendants' solicitors on the 9th April, 1934. In England the order does not become operative until it has been served on the opposite party but here it is the practice for a formal notice to take the place of actual service of the order.

The plaintiff is entitled under the will of Ho Sok Choo Neo, who died in December, 1931, to a contingent legacy of $5,000 payable 10 years after her death, i.e. in December, 1941. The defendants wish to apply this legacy so far as it will extend, in paying the costs of the action. For this purpose they ask for an order for payment of costs by the pauper coupled with an undertaking that they will not execute the order except by retainer out of the legacy if and when payable.

It was suggested by defendants' counsel that by virtue of section 1270 they might obtain an order to pay the costs out of the plaintiff's share in the trust funds. But this section only applies where the dispute relates to a particular legacy, etc. In this case the legacy was never in dispute at all and the section has no application.

The only question to be decided therefore is whether an order for costs can in any case be made against a pauper. Sections 766-776 inclusive of the Civil Procedure Code are based